

**Advisory Action**  
**Before the Filing of an Appeal Brief**

**Application No.**

10/541,111

**Applicant(s)**

BRUENING ET AL.

**Examiner**

STEFANIE COHEN

**Art Unit**

1732

**--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --**

THE REPLY FILED 14 January 2011 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.  
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.  
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

**NOTICE OF APPEAL**

2. ☐ The Notice of Appeal was filed on \_\_\_\_\_. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

**AMENDMENTS**

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because  
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);  
(b) ☐ They raise the issue of new matter (see NOTE below);  
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or  
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: \_\_\_\_\_. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).  
5. ☐ Applicant's reply has overcome the following rejection(s): \_\_\_\_\_.  
6. ☐ Newly proposed or amended claim(s) \_\_\_\_\_ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).  
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.  
The status of the claim(s) is (or will be) as follows:  
Claim(s) allowed: \_\_\_\_\_.  
Claim(s) objected to: \_\_\_\_\_.  
Claim(s) rejected: 24,26,28-38,40-49,51 and 52  
Claim(s) withdrawn from consideration: \_\_\_\_\_.

**AFFIDAVIT OR OTHER EVIDENCE**

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).  
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).  
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

**REQUEST FOR RECONSIDERATION/OTHER**

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:  
See Continuation Sheet.  
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). \_\_\_\_\_.  
13. ☒ Other: attached further references on 892 form.

/Melvin Curtis Mayes/  
Supervisory Patent Examiner, Art Unit 1732

/Stefanie Cohen/

SC

2/17/2011

Continuation of 11. does NOT place the application in condition for allowance because: Applicants argue that Fogel does not teach or suggest to one skilled in the art a composition analogous to that disclosed by Ansmann having the claimed melting point range.

Applicants respectfully reassert that Fogel is an improper reference to support the present obviousness rejection, and cannot cure the deficiency of Ansmann. More specifically, Fogel refers to the ideal physical properties of a cosmetic ester. Indeed, Fogel relates specifically to esters, which are not recited by the presently claimed invention. In the Office Action dated August 28, 2009, the Examiner stated that Fogel "indicates only that an ideal physical property of cosmetics (i.e. a melting point near body temperature) has been difficult to achieve in esters" and that "[t]here is no implication that the physical properties are not similarly desirable in other oily/waxy cosmetic substances." Office Action, pp. 3-4.

Examiner respectfully traverses. Although Fogel relates to a cosmetic composition comprising esters, it would have been obvious to one of ordinary skill in the art at the time of the invention that a cosmetic composition would be around body temperature to ensure optimal properties when applied to the body.

Ansmann teaches the use of distearyl ethers which is one specific ether that can be used in the instant claim. Ansmann teaches these ethers are used for cosmetic preparations. Fogel also teaches the use of cosmetic compositions which has the same use of the use of Ansmann therefore it would be expected one would want to achieve the same melting temperature as taught by Fogel with the composition as taught by Ansmann.

Ichikawa (5474778), col. 1 lines 42-50, teaches a cosmetic composition comprising various kinds of sterol esters having excellent moisture permeability because of its melting point of around 35oC to 40oC near the body temperature.

Hoeffkes (4919923), col. 1 lines 55-60, teaches cosmetic emulsions wherein it has now been found that pourable o/w emulsions having reduced viscosity and high stability in storage can be obtained providing C6-22 dialkyl ethers are used as the oil component. Accordingly, the present invention relates to cosmetic o/w emulsions which are pourable at ambient temperatures, especially 19o-22oC., and which contain as oil components at least one dialkyl ether corresponding to the formula R1 --O--R2, in which each of R1 and R2, independently of one another, are a linear or single-branch C6-22 alkyl.

Further, Hoeffkes, col. 2 lines 20-30, teaches the viscosity-reducing effect of the dialkyl ethers is generally discernible in o/w emulsions, although it is of particular practical value in emulsions of the type which are intended to be pourable at 20oC. The emulsions in question are preferably o/w emulsions containing from 70 to 99% (more preferably 75 to 95%) by weight of continuous (outer) aqueous phase, with the balance q.s. to 100% of discontinuous (inner) lipophilic phase.